

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In re:</b>	)	
	)	
<b>Transaction Network Services, Inc., TSYS</b>	)	<b>CC Docket No. 95-155</b>
<b>Acquiring Solutions, LLC and Electronic</b>	)	
<b>Payment Systems, LLC</b>	)	
	)	
<b>Regarding FCC Jurisdiction and RespOrg</b>	)	
<b>Responsibilities to Comply with Part 52 of</b>	)	
<b>the FCC's Rules and the MS/800 Tariff</b>	)	
<b>Requirements</b>	)	

**To: Office of the Secretary**  
**Attn: Chief, Wireline Competition Bureau**

**ELECTRONIC PAYMENT SYSTEMS, LLC'S APPLICATION FOR REVIEW**  
**OF DECISION OF THE WIRELINE COMPETITION BUREAU**

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**March 24, 2011**

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OF DECISION OF THE WIRELINE COMPETITION BUREAU**

**1. Introduction**

Pursuant to the provisions of 47 C.F.R. 1.115, Electronic Payment Systems, LLC, (EPS) respectfully submits this application for review seeking the Federal Communication Commission's review of the Declaratory Ruling of the Wireline Competition Bureau, Docket No. 95-155, *In the matter of Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC, Regarding FCC Jurisdiction and RespOrg Responsibilities to Comply with Part 52 of the FCC's Rules and the SMS/800 Tariff Requirements*, dated February 24, 2011 (the "Bureau's ruling"). In support of its application, EPS would show to the Commission as follows:

## **2. Questions presented**

1. Where two or more unaffiliated commercial entities enter into a voluntary agreement to transfer the subscriber's interest in toll free numbers in order to facilitate the continuation of business without interruption, (and there is no sale, hoarding, or brokering), can such transfer be accomplished through execution of a transfer of service agreement which indicates all parties, including the FCC, have been notified of the change?

If the answer to Question 1 is "no", then:

2. Where two or more unaffiliated commercial entities enter into a voluntary agreement to transfer the subscriber's interest in toll free numbers in order to facilitate the continuation of business without interruption, (and there is no sale, hoarding, or brokering), should the FCC approve such transfer even in the absence of "extraordinary circumstances involving public safety"?

## **3. Background facts**

### **a. Determinations by the arbitrator and the court**

This is a dispute between two commercial entities that, by agreement of the parties, has been resolved through arbitration. As it relates to this matter, the dispute involves seven toll free numbers (referred to collectively as the "EPS numbers") that are used by EPS merchants to process credit/debit card transactions through the services of TSYS as the processor. In an arbitration, it is the arbitrator who is to determine the facts between the

parties. The arbitrator's determination of the facts is binding on the parties and, once the arbitration has been confirmed by the federal district court, those factual determinations are also binding on the parties in subsequent proceedings before administrative agencies, such as the FCC.<sup>1</sup> The facts as determined by the arbitrator and confirmed by the court were summarized in an order entered by the Court:

TSYS and EPS are involved in the credit/debit card industry. The parties entered into an agreement in August 2005, which provided that EPS would use the processing services of TSYS. . . . As part of the agreement, TSYS agreed to install an exclusive 1-800 number on the point-of-sale terminals of EPS's merchant customers. EPS sought the exclusive number because it would permit EPS to move its merchant portfolio to another payment processing vendor if problems arose with TSYS. TSYS did not provide EPS with an exclusive 1-800 number, but rather "boarded" EPS merchants on seven 1-800 numbers also used by hundreds of thousands of non-EPS merchants.<sup>2</sup>

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<sup>1</sup>*American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280, 1285 (9<sup>th</sup> Cir. 1982)(The arbitrator's decision is what the parties bargained for and it is not to be disturbed by a reviewing court.); *Greenblatt v. Drexel Burnham Lamabert, Inc.*, 763 F.2d 1352, 1360, (9<sup>th</sup> Cir. 1985)(Once arbitrator's award has been confirmed by district court and becomes a judgment of that court, "the determination of issues in an arbitration proceeding should be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated."); *U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-23 (1966) (Collateral estoppel principles apply equally to administrative agencies as they do to federal courts.)

<sup>2</sup>Case No. 2:09-cv-0155, *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, See Order dated January 28, 2011 (Doc. No. 102), as modified by Order dated February 15, 2011, Doc No. 108).

The arbitrator found TSYS' actions to be a material breach of contract and entered an award requiring TSYS to "provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor." (Arbitrator's Award, dated January 20, 2009, p. 39.) To implement the arbitrator's award while at the same time avoiding interrupting the ability of non-EPS merchants to process transactions, the Court ordered a two step process:

Step 1: Make the EPS 1-800 numbers unique by having TSYS move the non-EPS merchants to other numbers. Once this is done, any adverse impact on non-EPS merchants using the EPS 1-800 numbers to complete transactions will be eliminated. Only EPS merchants will be using the EPS 1-800 numbers to complete transactions, and non-EPS merchants will be able to complete transactions using their new, non-EPS 1-800 numbers.

Step 2: Enforce TSYS' voluntary contractual commitment to transfer TSYS' interest as the subscriber having control over the EPS 1-800 numbers to EPS. After the transfer has been completed, the same merchants will be using the same numbers for the same purpose of processing credit card transactions without interruption.

Although TSYS has not undertaken step one, TSYS filed the present action with the FCC seeking to avoid having to perform step two, the transfer of TSYS' subscriber interest in the numbers to EPS. Proceeding unilaterally and without notice to EPS, TSYS sought a declaratory ruling from the Wireline Competition Bureau of the FCC. On February 24, 2011, the Bureau issued the requested ruling.

**b. The Bureau's ruling**

After indicating that its decision was intended merely to “reiterate our rules regarding the distribution and transfer of numbers,” the Bureau ruled that “Responsible Organizations (RespOrgs) cannot transfer toll free numbers directly from one entity to another without Commission approval.” The Bureau went further to state that such approval by the FCC has only been granted in “extraordinary circumstances involving public safety.”

**4. Discussion**

In its ruling the Bureau identifies the interest of the FCC, which is to regulate “the distribution and transfer” of toll free numbers. Towards this end, the FCC prohibits certain activities, including hoarding, brokering, or sales of numbers. EPS recognizes these legitimate interests of the Commission. However, In an effort to protect these interests, the Bureau's brush sweeps too broadly.

According to the ruling, a RespOrg is prohibited from transferring a toll free number without prior FCC approval, and such approval is unlikely except in “extraordinary circumstances involving public safety.” In its response to TSYS' petition, EPS encouraged the Bureau to recognize exceptions for certain types of transactions. The ruling indicates no exceptions. If allowed to remain unchanged, under the present ruling no transfers are permitted without prior FCC approval, no exceptions, and, such prior approval is unlikely except in cases involving public safety.

Under the Bureau's ruling, as it stands, the following transfers would not be permitted without prior FCC approval:

Mergers and acquisitions;

Transfers like those approved in the *Ford* case, discussed below; nor

Voluntary transfers between businesses to avoid service interruptions, even when there is no brokering, hoarding, or sale involved.

Since most of these transfers would not involve public safety issues, FCC approval is unlikely and the Bureau's ruling becomes, in essence, a complete bar to these transfers, even though no specific regulation violations are involved.

EPS believes the Bureau's ruling is contrary to existing regulatory provisions, existing case law, industry practice, and common sense and therefore, should be withdrawn or revised.

**a. Bureau's ruling is contrary to existing regulatory provisions - 855 numbers**

On their face the FCC's regulations contemplate waivers and exceptions. As noted in the Bureau's ruling, 47 C.F.R. 52.111 provides: "Toll free numbers shall be made available on a first-come, first-served basis, unless otherwise directed by the Commission. There is nothing in the FCC regulations that indicates waivers and exceptions can be found only in extraordinary circumstances where the public safety is at stake. Given the dire consequences of the Bureau's hard-lined stance, a more moderate view and interpretation is in order.

Official guidelines for 855 numbers (toll free numbers available to hearing impaired individuals) expressly describe a process for giving after-the-fact notification (without



approval) of subscriber changes in such cases. (See Atis-0300048, 555 NXX Assignment Guidelines, Section 6.5, November 12, 2010, available at <http://www.atis.org/inc/docs/.asp>).

There is no basis for applying a different rule for other types of 800 numbers. The only requirement for transfer of 855 numbers in the acquisition/merger setting is that the FCC be notified of the change. *Id.*

**b. Bureau's ruling is contrary to industry practice and common sense**

The Bureau's literal reading of the FCC's "first come, first served" 800 number assignment policy is inconsistent with common industry practice and is wholly impracticable. As the Commission is aware, tens of thousands of commercial transactions occur each year, including mergers, acquisitions, and other voluntary agreements entered into to facilitate the uninterrupted continuation of businesses that involve a change in the official subscriber of an 800 toll free number. For example, when Ford sold Jaguar to Tata Motors, the Court ordered the roadside assistance provider to transfer the number 800-JAGUAR to the new owner of the company at Ford's request because it was part of the business, was printed in owner's manuals and so on.

Even TSYS believes transfers can be made without FCC involvement. In its representations to the FCC (and to the Court) TSYS portends to believe numbers cannot be moved from one subscriber to another at the unilateral instance of the subscriber. TSYS is not being candid with the Commission. TSYS has entered into contracts with both of its RespOrg/carriers that expressly authorize such transfers. Section 27.1 of TSYS' contract with TNS allows TSYS unilaterally to require the transfer of numbers, even without TNS'

consent. Similarly, TSYS' contract with Verizon allows TSYS to require a transfer of the numbers with Verizon's consent, which consent cannot be unreasonably withheld. Neither of TSYS' contracts with its RespOrgs makes any provision for FCC approval of such transfers, before or after they occur. TSYS failed to disclose to the FCC these contractual provisions that TSYS has required in its contracts, and that are diametrically contrary to the position TSYS has asked the FCC to adopt.

If the Bureau's ruling stands, those tens of thousands of transactions throughout the United States each year would come to a grinding halt, awaiting FCC approval. The fact that no merger, acquisition, nor transfer of business interests ever includes a request to the FCC, and that RespOrgs routinely implement all such subscriber name changes without FCC involvement, provides ample evidence that industry practice, common sense, and the FCC's more flexible interpretation of "first come, first served" rule (at least until the Bureau's ruling) permits transfers without approval in such instances.<sup>3</sup>

**c. Bureau's ruling is contrary to case law**

The case law that most directly addresses the issues in this matter is *Ford Motor Co. v. United States Auto Club*, 2008 U.S. Dist. LEXIS 74198 at \*12. In *Ford*, Jaguar (as part of

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<sup>3</sup>It would be interesting, and undoubtedly useful to the Commission in its decision making process, to inquire of RespOrgs as to how many times during the past year they have transferred numbers from one subscriber to another without advance FCC approval. EPS believes for each RespOrg the answer would be dozens of times in the case of acquisitions, mergers, and similar business related circumstances, such as those in *Ford* and the present case.. Each such transfer would be a violation of the Bureau's ruling and, as pointed out by the Bureau, could subject the RespOrg to sanctions, including termination. It would also be interesting to note whether RespOrgs have ceased making transfers without advance FCC approval in light of the Bureau's ruling.

Ford) and Land Rover (collectively, the “Car Companies”) provide roadside assistance to their customers, by outsourcing it to a third party provider. Auto Club was the initial third party provider. The Car Companies transferred to Auto Club the five toll free numbers that appear in the Car Companies’ literature, so Auto Club could answer the customers’ calls. Later, the Car Companies terminated the contract with Auto Club, and contracted with a new third party service provider, Cross Country, to provide the service. The Car Companies requested that Auto Club transfer the toll free numbers to the new service provider, but Auto Club refused. The contract between the Car Companies and Auto Club did not expressly require such transfer. The Car Companies sued seeking the transfer of the numbers, despite the absence of any contractual obligation for such transfer. Auto Club defended in reliance on the same argument that the Bureau set forth in its ruling - that the FCC’s rules do not provide for direct transfer of numbers between subscribers. The Court rejected Auto Club’s argument and held that transfer of numbers are prohibited only if they violate the regulations by allowing hoarding, brokering, or sale of a toll free number, stating:

The plain language of the regulation prohibits three things: (i) the acquisition of more toll free numbers than the subscriber intends to use for providing toll free service, (ii) the acquisition of a toll free number for the purpose of selling it to another person or entity for a fee, and (iii) the selling of a toll free number by a private entity for a fee. *Id.*

The Court compelled the transfer of the numbers to the new service provider. Such use facilitated providing service to the customers without interruption and did not violate

FCC regulations. *Id.* The Court makes no mention of any need for FCC approval. In fact, the Court alludes to the fact that in order to effectuate a transfer of subscriber interest, the parties merely need to sign a “transfer of service agreement” to reflect that the assignment is voluntary and not in violation of FCC rules. *Id.*

**5. How the Bureau’s ruling should be modified:**

To be consistent with existing FCC regulations, industry practice and common sense, and case law, EPS requests that the Bureau’s ruling be modified as follows:

1. Expressly recognize that in cases of merger, acquisition, or Court order in circumstances where the numbers are to be used after transfer in furtherance of the same business as before the transfer, prior FCC approval is not required, so long as no FCC regulation such as those prohibiting hoarding, brokering or sale of numbers is implicated.<sup>4</sup>
2. In such instances, allow for the transfer to be documented through execution of a transfer of service agreement indicating the nature of the change and confirming that all parties and the FCC have been notified of the change.
3. Delete the prohibition against the DSMI and RespOrgs honoring such requests.
4. Delete the references to waivers based on public safety, as they are inapplicable to the

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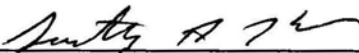
<sup>4</sup>Hoarding is obtaining numbers and not using them. Since even TSYS admits that all seven EPS numbers are used by EPS merchants for electronic transactions, the numbers are in use and will continue to be in use, following their transfer to EPS. There are no numbers that are being hoarded and not used. Likewise, EPS is not brokering or selling the numbers to another for consideration. The agreement between TSYS and EPS in 2005 was part of the larger agreement to provide processing services to EPS in a manner that assured the continued business operation of EPS and its merchants.

present situation, and to the extent waivers are discussed at all, acknowledge that they are not limited to exceptional circumstances involving public safety.

**6. Conclusion**

The Bureau's ruling properly recognizes the interest of the FCC in the distribution and transfer of toll free numbers. Unfortunately the Bureau swept too broadly to protect those interests. The ruling should be narrowed and carefully tailored by the FCC, consistent with FCC regulations and case law, to reflect the industry practice and common sense approach to allowing transfers of numbers without FCC approval in the limited circumstances set forth above.

**RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of March, 2011.

  
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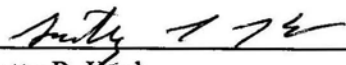
## CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2011, I electronically transmitted the foregoing document to the Federal Communications Commission using the ECFS System for filing. A copy of the foregoing Application for Review to the following via first-class mail, postage prepaid:

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